

NO.: 4D24-1424
L.T. CASE NO.: 502023CA000935

**IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT**

EARL DEAN LILLY, JR.,
Appellant,

v.

PALM BEACH COUNTY,
Appellee.

From the Circuit Court for the Fifteenth Judicial Circuit
Palm Beach County, Florida

APPELLEE PALM BEACH COUNTY'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Appellee, Palm Beach County, will be referred to as such or as “the County.” The Appellant, Earl Dean Lilly, Jr., will be referred to as such or as “Lilly.” The Record will be cited as “R. #”. Appellant’s Initial Brief will be cited as “IB. #”.

STATEMENT OF CASE AND FACTS

Lilly, a vexatious litigant¹, appeals the trial court’s final order dismissing his consolidated complaints with prejudice for failure to state a cause of action against the County. [R. 320 – 322] The County provides the following statement of facts and procedural history of the case in the lower tribunal because Lilly’s statement of the case and facts in his initial brief is incomplete.

¹ On September 17, 2023, in a case Lilly filed against the Palm Beach County Sheriff’s Office based upon the same facts as this case, Judge Bradley Harper entered an order dismissing that case with prejudice and classifying Lilly as a vexatious litigant; this Court affirmed that order in case number 4D2023-2451.

In February 2023 Lilly filed three nearly identical complaints against the County. [R. 7 – 52, 78 - 154] Lilly’s complaints stem from three separate complaints he filed in 2019, against the Riviera Police Department, the West Palm Beach Police Department, and the Palm Beach County Sheriff’s Office where, similar to his claims against the County, he alleged that these law enforcement agencies allowed actors to impersonate police officers thereby violating his rights. [R. 14, 82, 121]

In the instant case, Lilly alleges that while he was litigating those three 2019 cases (which is why he filed three separate complaints against the County), the County negligently permitted well-known professional actors to impersonate court personnel, litigants, and judges during hearings in those cases. [R. 7 – 52, 78 - 154]

In addition, Lilly alleges that the judges from these 2019 cases traveled to Delaware to harass and stalk him. *Id.* Some of the actors that Lilly listed as potential witnesses include Jim Carrey,

Brad Pitt, Bill Murray, and Anthony Hopkins. *Id.* And some of the actors he alleges were in the courtrooms include Klaus Maria Brandauer, Kyle Eastwood, and Clint Eastwood. [R. 372] Notably, none of these individuals are County employees.

In response to the complaint, the County filed a notice of appearance on February 22, 2023 [R. 4], and a motion for extension of time to respond. [R. 53 – 54] Subsequently, Lilly moved to consolidate the three complaints he filed against the County. [57 – 64] The parties agreed to consolidate these cases, and as such, Judge Scott Kerner entered an agreed order consolidating the cases on April 18, 2023. [R. 68 – 69] Judge Kerner subsequently clarified the agreed order on June 12, 2023, specifying that all pleadings should be filed under the instant lower tribunal case number. [R. 74]

Following the consolidation of the three cases, Lilly moved to disqualify Judge Kerner because the Judge's brother, Dave Kerner, was a County Commissioner. [R. 160 – 163] Judge Kerner granted

Lilly's motion. [R. 164 – 165] Therefore, the case was reassigned to Judge Reid P. Scott who entered a case management order on October 13, 2023. [R. 182 – 190]

Subsequently, Lilly moved the court to transfer venue outside of the 15th Judicial Circuit, alleging that the sword-wielder exception to the home venue privilege applied because the allegations in his complaints that the County allowed actors to stage fake court in his cases were likely to recur. [R. 202 – 205] Lilly then filed a Suggestion of Non-Compliance With Pre-Trial Order alleging that the County failed to comply with the case management order by not answering the complaints and requesting a hearing on his previously filed motion to transfer venue. [R. 219 – 223]

Following a hearing held on March 26, 2024, the court denied Lilly's Suggestion of Non-Compliance With Pre-Trial Order finding that the County timely responded to the complaints and denying his motion to transfer venue. [R. 314, 330]

On March 18, 2024, the County filed its Motion to Dismiss Plaintiff's Complaint and Supporting Memorandum of Law. [R. 294 – 305] The County argued that Lilly's complaint should be dismissed because of the county's sovereign immunity. *Id.* Specifically, the County argued that County employees did not perform the acts forming the basis of Lilly's complaint, and therefore, the County had not waived its sovereign immunity under section 768.28(1), Florida Statutes. *Id.* Similarly, the County also argued that it was not liable under title 42, section 1983, United States Code because the alleged wrongdoers were not County employees or acting under color of County law. *Id.*

Lilly filed an objection to the County's motion to dismiss. However, it was not docketed with the trial court because, as previously discussed, on September 17, 2013, Judge Bradley Harper entered an order classifying Lilly as a vexatious litigant thereby preventing the Clerk of the 15th Judicial Circuit Court from docketing any of his filings without first obtaining leave from the

administrative judge. Judge Harper's order was affirmed by this Court in case number 4D2023-2451.

Nevertheless, the County provided Judge Scott with a copy of Lilly's objection to the County's motion to dismiss, and the Judge stated on the record at the hearing on the motion to dismiss held on May 3, 2024, that he received it and reviewed it before the hearing. [R. 341] During the hearing, the County argued that because none of the individuals that Lilly alleged harmed him were County employees, the limited waiver of sovereign immunity for torts committed by County employees was inapplicable. [R. 345] In addition, the County argued that Lilly's Federal claim under section 1983 similarly failed because none of the alleged individuals that caused Lilly harm were County employees or acting under the authority of the County. [R. 346 – 347]

In response, Lilly argued that the County's motion to dismiss was tardy. [R. 347] He also argued that the County could be held liable because it operated the film commission that would have

issued a permit for filming in the County. [R. 348] However, this argument went beyond the four corners of Lilly's complaints since they do not mention or implicate any permits issued by the film commission.

Following the parties' presentations, the Judge stated that even though Lilly's objection to the County's motion to dismiss was not docketed, he received a copy and reviewed it prior to the hearing. [R. 352 – 353] The Judge also stated that the County's motion to dismiss was timely. *Id.* The Judge granted the County's motion to dismiss, stating that none of the individuals identified in the complaint as having allegedly caused damage to Lilly were employees of the County or acting on behalf of the County. [R. 353] Furthermore, he found that the judges who allegedly stalked Lilly are employed by the Office of the State Court Administration, the deputy sheriffs are employed by the Palm Beach County Sheriff's Office, and any civilians posing as actors would be independent contractors, not employed by the County. [R. 353 – 354]

As such, the Judge dismissed the complaint with prejudice. [R. 355] Lilly then made an ore tenus motion for a re-hearing because as a vexatious litigant he would not be allowed to file a written motion for a re-hearing without leave of the administrative judge. [R. 356] Lilly argued that he should be allowed to name the defendant properly. *Id.* The Judge denied Lilly's motion for re-hearing. [R. 357]

Subsequently, on May 6, 2024, the Judge issued his Order on Defendant's Motion to Dismiss Plaintiff's Complaints stating that the complaints "are dismissed with prejudice as the Court finds that the Defendant is protected by Sovereign Immunity and that, on the four corners of the Complaints, the individuals alleged in Plaintiff's Complaints are not County employees and could not have been acting in an official capacity for the County." [R. 318] In addition, the Judge stated that he already ruled on the timeliness of the motion to dismiss when ruling on Lilly's Suggestion of Non-

Compliance and stated that he denied Lilly's ore tenus motion for re-hearing. *Id.* This order is the subject of this appeal.

SUMMARY OF ARGUMENT

The trial court's order dismissing Lilly's complaint with prejudice was proper because the alleged tortfeasors were not County employees nor acting under County authority. Furthermore, dismissal with prejudice was appropriate because Lilly did not request leave to amend his complaint to cure the defects.

The County's motion to dismiss was timely because sovereign immunity concerns the court's subject matter jurisdiction and, therefore, can be raised at any time, and the trial court's failure to default the County conforms with the Florida Rules of Civil Procedure and this Court's prior rulings.

Additionally, the trial court's denial of Lilly's motion to transfer venue was proper because the sword-wielder doctrine does not apply to negligence cases.

Finally, Lilly's arguments concerning the disqualified judge's rulings are not reviewable because they were not preserved for appeal.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED LILLY'S COMPLAINT WITH PREJUDICE BECAUSE THE ALLEGED TORTFEASORS WERE NOT COUNTY EMPLOYEES.

"[I]n reviewing an order dismissing a complaint for failure to state a cause of action, the appellate court's scope of review is relatively narrow. The court merely looks to the four corners of the complaint to determine whether it states a cause of action. The court takes all well pleaded allegations therein as true." *Aaron v. Allstate Ins. Co.*, 559 So. 2d 275, 276 (Fla. 4th DCA 1990).

In the instant case, Lilly's complaint alleges that the County harmed him by negligently allowing professional actors to hold fake court while he litigated cases in 2019. [R. 10 – 22] Additionally, he alleges that several judges from those cases subsequently traveled to Delaware, where he resides, to stalk and harass him. [R. 15]

Taking these fantastical allegations as true, the County cannot be liable to Lilly because the County does not employ any of these alleged tortfeasors.

Section 768.28, Florida Statutes, waives sovereign immunity in tort actions and must be strictly construed. *Florida Dept. of Transp. v. Schwefringhaus*, 188 So. 3d 840, 846 (Fla. 2016).

Section 768.28(1) states:

“the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission **of any employee of the agency or subdivision while acting within the scope of the employee's office or employment** under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.” (emphasis added).

The statute clearly waives sovereign immunity only for losses caused by the negligent or wrongful acts of the County's employees. Lilly does not allege, nor can he, that the actors who allegedly participated in the fake court on the days he happened to be in the courthouse were employed by the County. Furthermore, the judges that allegedly stalked him are not County employees; rather, they are employed by the Florida State Courts System as the County set forth in its motion to dismiss. [R. 299 – 300]. Consequently, the trial court properly ruled that “on the four corners of the Complaints, the individuals alleged in Plaintiff's Complaints are not County employees and could not have been acting in an official capacity for the County.” Therefore, the trial court properly ruled that the County was protected by sovereign immunity and dismissed Lilly's case with prejudice. Nothing within the four corners of the complaints can alter the trial court's conclusion. Thus, the trial court's order should be affirmed.

Similarly, Lilly's title 42, section 1983, United States Code claims also fail because the alleged wrong doers were not County employees or acting under color of state or county law. Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

Local governments are subject to liability under section 1983. *Raben-Pastal v. City of Coconut Creek*, 573 So. 2d 298, 300 (Fla. 1990) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978)). However, a local government is only liable for the act of a private party where it has compelled or ordered the private party to act under a statute, ordinance, regulation, custom, or usage. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978).

Here, Lilly alleges that professional actors, who are private parties, violated his Constitutional right to access the courts by staging fake court on the days that he had hearings.

Notwithstanding the preposterous nature of these allegations, Lilly does not assert in his complaint, nor could he, that the County compelled or ordered these actors to hold fake court. In his objection to the motion to dismiss, he speculates that the County's film commission may have issued a permit for the actors to utilize the courthouse, but issuing a permit to a private party does not convert that party's conduct into County action. See *id.*

Furthermore, he did not allege the issuance of a permit in his complaint. Therefore, the trial court's order finding that the County was not liable because the actors were "not County employees and could not have been acting in an official capacity for the County" is in accordance with established law under section 1983, is wholly proper, and should not be overturned.

In addition, dismissal with prejudice should also be affirmed because Lilly did not request leave to amend. “[A] party who does not seek to amend in the trial court cannot raise the issue of amendment for the first time on appeal.” *Stander v. Dispoz-O-Products, Inc.*, 973 So. 2d 603, 605 (Fla. 4th DCA 2008).

Lilly never moved to amend his complaint. During the hearing on the motion to dismiss, the trial court allowed Lilly to make an ore tenus motion for rehearing because, as a vexatious litigant, he could not file any written motions without leave of court. [R. 356]. As grounds for a re-hearing, Lilly stated: “The grounds would be because of the ability of the federal rules of civil procedure allow me to state the correct name, to correct the party’s name at any time before trial.” *Id.* This is not a request for leave to amend to attempt to cure the defects that were the subject of the order on appeal. Rather, this relates to the County's first argument in its motion to dismiss, that Lilly should have listed the defendant as Palm Beach County instead of Board of Commissioners of Palm Beach County.

[R. 296 – 297]. This is supported by Lilly’s subsequent argument to the trial court during the motion for re-hearing portion of the hearing that he had case law holding that it did not matter if the defendant in a 768.28 case was misnamed so long as it received and accepted the pre-suit notice. [R. 356 – 357].

Additionally, Lilly, as a vexatious litigant, could have attempted to obtain an order from the administrative judge to file a written motion for a re-hearing, or a motion for leave to amend his complaint. § 68.093(5), Fla. Stat. Lilly never attempted this. Because Lilly did not request leave to amend his complaint, that issue was not preserved for appeal.

II. THE COUNTY’S MOTION TO DISMISS WAS TIMELY

Lilly in his Initial Brief repeatedly argues that the County’s motion to dismiss was untimely and that the trial court should have entered a default against the County. However, the County’s motion to dismiss was based on sovereign immunity which concerns subject matter jurisdiction and, as such, can be raised at

any time. *Kirk v. Kennedy*, 231 So. 2d 246, 248 (Fla. 2D DCA 1970) (holding “the defense of sovereign immunity relates solely to the jurisdiction of the court over the subject matter of the cause” and “under our Rules of Civil Procedure appellants could at any time move to dismiss appellees’ amended complaint on the ground that the court lacked jurisdiction of the subject matter.”).

Furthermore, rule 1.140(h)(2), of the Florida Rules of Civil Procedure, states “[t]he defense of lack of jurisdiction of the subject matter may be raised at any time.” Therefore, the County had the right under case law and under rule 1.140(h)(2) to raise the trial court’s lack of subject matter jurisdiction at any time.

The County’s motion was also timely because the trial court never entered a default against the County. Under rule 1.500(a) of the Florida Rules of Civil Procedure a default by the clerk of the court **may** be entered if the defendant “has failed to file or serve any document in the action.” Here, the County filed a notice of appearance and a motion for extension of time to respond to the

complaint. [R. 4, 53 – 54]. Furthermore, Lilly never moved for a clerk’s default. Therefore, the clerk could not enter a default against the County.

Similarly, the trial court was not obligated to enter a default against the County. Rule 1.500(b) of the Florida Rules of Civil Procedure states:

When a party against whom affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or any applicable statute or any order of court, the court **may** enter a default against such party; provided that if such party has filed or served any document in the action, that party must be served with notice of the application for default. (emphasis added).

The rule is clearly permissive. The trial court is not obligated to enter a default if a party has not timely filed a pleading or defense, even if failing to have done so violates a court order. Furthermore, rule 1.500(c) states that “[a] party may plead or otherwise defend at any time before default is entered.” The trial court never entered a

default against the County. Therefore, the County was allowed to file its motion to dismiss.

Thus, the trial court's failure to default the County is completely justified by the Florida Rules of Civil Procedure and this Court's prior holdings that rule 1.500 "should be construed liberally to allow trial upon the merits rather than to encourage resolution of legal disputes by default." *National Union Fire Ins. Co. of Pittsburgh, PA v. McWilliams ex rel. Estate of Meyer*, 799 So. 2d 378, 380 (Fla. 4th DCA 2001) (holding that a default is improper where the defendant is represented by counsel and intends to defend the lawsuit). Therefore, the County's motion to dismiss was timely and properly before the trial court.

III. THE TRIAL COURT PROPERLY DENIED LILLY'S MOTION TO TRANSFER VENUE.

In his initial brief, Lilly relies on a non-existent statute, section 38.13, to argue that his motion to transfer venue should have been granted, but there is no section 38.13, Florida Statutes. [IB. 18].

Rather, Lilly based his motion to transfer venue on the sword-wielder exception to the home venue privilege. However, the case law is clear that the sword-wielder exception does not apply to negligence actions. *Carlile v. Game and Fresh Water Fish Commission*, 354 So. 2d 362, 366 (Fla. 4th DCA 1977) (holding that “the sword-wielder exception does not, nor was ever intended, to encompass allegations of negligence.”); *Dep’t of Health and Rehabilitative Svcs. v. Wagner*, 361 So. 2d 739, 740 (Fla. 4th DCA 1978) (holding that in “*Carlile*, we determined that a tort action brought against the state or one of its agencies must be maintained in the county wherein the agency maintains its principal headquarters.”).

Here, Lilly’s complaint alleges the County was negligent in allegedly allowing actors to hold fake court when he happened to be attending hearings in 2019. Therefore, under the cases cited above, the sword-wielder exception is inapplicable, and the Court’s

decision to deny Lilly's motion to transfer venue was proper and should not be disturbed.

IV. LILLY'S ARGUMENTS RELATED TO THE CONDUCT OF THE DISQUALIFIED JUDGE WERE NOT PRESERVED FOR APPEAL.

Throughout his initial brief Lilly argues that Judge Kerner, the Judge that disqualified himself because his brother was a Palm Beach County Commissioner, should have entered a default against the County and that the new judge assigned to the case, Judge Scott, should have vacated Judge Kerner's decisions. [IB. 13 – 16]. Lilly's arguments are meritless.

First, as set forth in Section II of this answer brief, the trial court did not have to default the County, and its decision not to was consistent with the Florida Rules of Civil Procedure and with this Court's prior decisions.

Second, Judge Kerner entered three orders in this case, including his order recusing himself, and Lilly did not petition the new judge to review those orders as required under section 38.07,

Florida Statutes. Judge Kerner entered the first order on April 18, 2023, it was an agreed order consolidating Lilly's complaints. [R. 68 – 69]. Judge Kerner entered the second order on June 12, 2023, and it clarified his prior agreed order on the consolidation. [R. 74 – 75]. Judge Kerner entered the third order on July 6, 2023, and it was the order disqualifying himself. [R. 164 – 165]. Thereafter, the clerk reassigned the case to Judge Scott on July 12, 2023. [R. 170].

Under section 38.07, Florida Statutes, Lilly then had 30 days from July 12, 2023, to petition Judge Scott “for a reconsideration of the orders entered by the disqualified judge prior to the date of the entry of the order of disqualification.” Lilly never filed such a petition. Therefore, that issue was never before the trial court and cannot be raised on appeal for the first time. *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) (holding “[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued

on appeal or review must be part of that presentation if it is to be considered preserved.”).

CONCLUSION

The trial court’s order dismissing Lilly’s consolidated complaint with prejudice was wholly proper based on the allegations contained within its four corners and his status as a vexatious litigant. Therefore, Palm Beach County respectfully requests this Court affirm the order granting the County’s motion to dismiss.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished via U.S. Mail to Earl Dean Lilly, Jr., Pro Se, P.O. Box 54, Hartly, Delaware, 19953, and via email at odysseus9a@aol.com this ___ day of _____, 2024.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font and word count limit requirements of Florida Rules of Appellate Procedure 9.045 and 9.210 and is being filed in Bookman Old Style 14-point font with a word count that does not exceed 13,000 words.

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